

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Gregory Watson 60705

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2482

Gregory Watson

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By her order dated 11 July 1986, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri suspended Appellant's License for four months plus an additional four months remitted on twelve months probation upon finding proved the charge of misconduct. This case was remanded to the Administrative Law Judge by the Vice-Commandant in Appeal Decision 2446 (WATSON) on 19 March 1987 in order to rule on proposed findings of fact and conclusions of law. Consistent with the remand, the Administrative Law Judge subsequently issued rulings on the proposed findings of fact and conclusions of law on 1 April 1987. On 12 April 1988, the Administrative Law Judge reinstated the original decision and order of 11 July 1986, incorporating by reference the Rulings on the proposed findings of fact and conclusions of law.

The specification found proved alleges that on or about 1 September 1985, Appellant, while serving as operator aboard the M/V ETTA KELCE, under the authority of the captioned license, failed to post a proper lookout, a violation of Rule 5 of the Inland Rules of the Road, at approximately Mile 44, on the Kanawha River, West Virginia.

At the hearing, Appellant was represented by professional counsel and denied the charge and specification. The Investigating Officer introduced in evidence four exhibits and the testimony of two witnesses. In defense, Appellant introduced in evidence the testimony of one witness.

Subsequent to the hearing, the Administrative Law Judge rendered a decision in which she concluded that the charge and specification had been proved and entered a written order suspending all licenses and certificates issued to Appellant for four months outright, plus an additional suspension of four months remitted on twelve months probation. The complete Decision and Order was served on 11 July 1986. The original appeal was timely filed and perfected on 17 October 1986. By his letter of 7 June 1988, counsel for Appellant filed and perfected his appeal of the reinstated Decision and Order entered on 12 April 1988 by relying on and citing to the original appeal perfected on 17 October 1986.

FINDINGS OF FACT

Appellant is the holder of a Coast Guard license authorizing him to serve as operator of uninspected towing vessels.

On 1 September 1985, Appellant was serving as operator on board the M/V ETTA KELCE, an uninspected towing vessel 90 feet in length, 1200 horsepower, pushing seven empty barges ahead on the Kanawha River. The overall length of the tow was 1,075 feet. From Mile 31 to Mile 44.5 the weather was very foggy so that at times the operator could not see the head of the M/V ETTA KELCE from the wheel house at which he manned the wheel while also serving as lookout. At no time did Appellant, as operator, post a lookout on the ETTA KELCE or the tow. At approximately Mile 42, upon sighting a downbound recreational motorboat passing the tow, Appellant reduced the speed of the ETTA KELCE. At that particular time, he could see only one barge length ahead of the towing vessel (approximately 200 feet). At approximately Mile 44.5, Appellant sighted a capsized motorboat approximately 250-300 feet ahead and about 10 feet from the port side of the tow. Two bodies were recovered and one survivor was rescued from the river. The Kanawha River from Mile 38 to Mile 43.5 is congested with recreational vessels that are docked along the river banks. A collision between the motorboat and the ETTA KELCE or its tow was not alleged nor proved.

BASIS OF APPEAL

Appellant's bases of appeal are as follows: (1) It was error for the Administrative Law Judge to find that it was misconduct for Appellant to fail to post a bow lookout; (2) It was error for the Administrative Law Judge to state in the Decision and Order that without a bow lookout, the ETTA KELCE and tow should not have been moving under the conditions that existed on the day in issue; (3) It

was error for the Administrative Law Judge to state in the Decision and Order that the ETTA KELCE and tow could have pulled over and moored until the fog abated.

Appearance: Thomas W. Pettit, Esq.; Vinson, Meeks, Lewis & Pettit;
1000 Old National Bank Bldg. P.O. Box 349, Huntington, WV 25708.

OPINION

Appellant asserts that the Administrative Law Judge erred in determining that the Appellant was required to post a bow lookout considering all of the factors existing on 1 September 1986. In other words, under the circumstances, could Appellant maintain a proper lookout from his position in the wheelhouse while also acting as operator of the towing vessel ETTA KELCE. Appellant contends that in this case, the Appellant served as both the vessel operator and the lookout, and that this is a recognized practice by the Commandant as evidenced in Appeal Decision 2420 (LENTZ). Appellant contends that under the circumstances it was prudent for him to act as both operator and lookout. Appellant further relies on *United States v. Adams*, 376 F.2d 459 (3rd Cir. 1967) to support his argument. Appellant urges that *Adams*, supra, recognizes that lookouts are not required to be stationed forward under all circumstances.

I do not agree with Appellant. The pertinent statute that was violated is 33 U.S.C. 2005 (Inland Rule of Navigation 5) which states

Every vessel shall at all times maintain a proper lookout by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make full appraisal of the situation and the risk of collision.

The prevailing circumstances and conditions in this case clearly indicate that it was reasonable to find that a proper lookout was not maintained. Appellant's assertions to the contrary are without merit. The facts of *LENTZ*, supra, differ significantly from the facts of this case. In *LENTZ*, the towing vessel was positioned alongside a single barge which was only 230 feet in length. Moreover, the solitary barge being towed extended only 100 feet ahead of the towing vessel. Additionally, and significantly, visibility was in excess of five miles (emphasis added). This scenario contrasts sharply and dramatically with the instant case in which the overall length of the tow was 1,075 feet, with the entire tow ahead of the towing vessel.

Most significant is the fact that visibility in the instant case varied from only a few feet to about 500 feet. LENTZ, supra, cited specifically to Senate Report 96-979 which accompanied the Inland Navigation Rules. That Senate Report acknowledged that at times an operator at the helm could serve as lookout. However, that Report provided a significant caveat relating to the practice of doubling as an Operator/helmsman and lookout:

On vessels where there is an unobstructed all-round view provided at the steering station, as on certain pleasure craft, fishing boats, and towing vessels, or where there is no impairment of night vision or other impediment to keeping a proper lookout, the watch officer or helmsman may safely serve as the lookout. However, it is expected that this practice will only be followed after the situation has been carefully assessed on each occasion, and it has been clearly established that it is prudent to do so. Full account shall be taken of all relevant factors, including but not limited to the state of the weather, conditions of visibility, traffic density, and proximity of navigational hazards. S. Rep. No. 979, 96th Cong., 2nd Sess. 7-8 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN NEWS 7068, 7075 (Emphasis supplied).

Each situation must be considered independently, the Administrative Law Judge considering and weighing all factors to determine if in fact a separate bow lookout is required. In the instant case, considering the number of barges in the tow, the length of the tow, the density of the fog creating a situation of very restricted visibility and the congested nature of the river, it was reasonable for the Administrative Law Judge to find that a separate bow lookout at the head of the tow was required. As the Vice-Commandant has stated previously in Appeal Decision 2474 (CARMIENKE):

The adequacy of a lookout on board a vessel underway is a question of fact to be resolved under all existing facts and circumstances... The Administrative Law Judge was in the best position to determine whether the circumstances of the case permitted the helmsman to serve as a proper lookout.

See also, Appeal Decision 2319 (PAVELEC), Appeal Decision 2421 (RADER), Appeal Decision 2390 (PURSER). Federal case law has also held that an operator serving as helmsman on a tug and tow with restricted visibility ahead is not a proper lookout. *Oil Transfer Corp. v. Diesel Tanker F.A. Verdon, Inc.*, 192 F. Supp. 245 (S.D.N.Y. 1960).

Appellant's reliance on *United States v. Adams*, *supra*, is not well founded since that was a criminal case requiring a more stringent standard of proof. Suspension and Revocation Proceedings are administrative in nature. Moreover, they have long been held to be remedial rather than penal in nature, their primary purpose being the protection of seamen and the safety of life at sea. Appeal Decision 1931 (POLLARD); *Aff. sub nom. Commandant v. Pollard*, NTSB Order EM-33, 2 NTSB 2663 (1974); Appeal Decision 2254 (YOUNG). The standard of proof in these proceedings is proof by a preponderance of the evidence. In a criminal proceeding, proof beyond a reasonable doubt is the standard. Even an acquittal in a criminal proceeding would not bar a suspension and revocation action. Appeal Decision 2430 (BARNHART). Consequently, *United States v. Adams*, *supra*, holds no precedential value in regards to this case.

I find that the Administrative Law Judge was neither arbitrary nor capricious in determining that a forward lookout was required by Inland Rule 5. "It is within the purview of the fact-finder, after hearing all the testimony and viewing the evidence, to determine findings. The Administrative Law Judge can only be reversed on these matters if his findings are arbitrary, capricious, clearly erroneous, and unsupported by law." Appeal Decision 2474 (CARMIENKE). See also, Appeal Decision 2390 (PURSER); Appeal Decision 2363 (MANN); Appeal Decision 2356 (FOSTER); Appeal Decision 2344 (KOHAJDA); Appeal Decision 2340 (JAFEE); Appeal Decision 2333 (AYALA). The Administrative Law Judge's finding that Appellant failed to maintain a proper lookout is supported by substantial evidence of a reliable and probative character.

Finally, I find that it was not error for the Administrative Law Judge to state in the Decision and Order opinions regarding ceasing the operation of the vessel and tow in the absence of a posted bow lookout. The Administrative Law Judge correctly found that a bow lookout on the lead tow was required for the safe navigation of the ETTA KELCE and tow. Consequently, it was reasonable and appropriate for the Administrative Law Judge to opine that since a bow lookout was required under the circumstances for safe navigation, the operator

should not have operated the vessel and tow without an adequate lookout. Mooring the vessel and tow to the river bank was certainly a viable and reasonable option cited by the Administrative Law Judge.

CONCLUSION

I find that Appellant has not established sufficient cause for me to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The Decision and Order of the Administrative Law Judge dated 11 July 1986, reinstated on 12 April 1988, as modified by the Administrative Law Judge's Ruling on Proposed Findings of Fact and Conclusions of Law, dated 1 April 1987, is AFFIRMED

CLYDE T. LUSK, JR
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 24th day of February, 1989.

7. NEGLIGENCE

.50 Lookout

adequacy of, a question of fact

adequacy of, where operator acting as

failure to maintain

specification, sufficiency of

10. MASTERS, OFFICERS, SEAMEN

.33 Operator

acting as sole lookout

duty to ensure proper lookout posted

11. NAVIGATION

.31 Fog

operator acting as sole lookout

.53 Lookout

adequacy of, a question of fact

adequacy of, where operator acting as

failure to maintain

.65 Navigation Rules

Rule 5 (lookout), legislative history discussed

.96 Standard of Proof

CITATIONS

Appeal Decisions Cited: 2420 (LENTZ), 2474 (CARMENKE), 2319 (PAVELEC), 2390 (PURSER), 2421 (RADER), 2356 (FOSTER), 2344 (KOHADA), 2340 (JAFEE), 2333 (AYALA), 1931 (POLLARD), 2254 (YOUNG), 2430 (BARNHART).

Federal Cases Cited: U.S. v. Adams, 376 F.2d 459 (3rd Cir. 1967), Oil Transfer Corp. v. Diesel Tanker F.A. Verdon, Inc., 192 F. Supp. 245 (SDNY 1960).

Regulations Cited: 46 CFR 5.701.

Statute Cited: 33 U.S.C. 2005, 46 U.S.C. 7702.

***** END OF DECISION NO. 2482 *****